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August 18, 2014

Federal Election Commission
Office of Complaints Examination
and Legal Administration
ATTN: Frankie Hampton, Paralegal
999 E Street, NW
Washington, DC 20436

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RECEIVED
FEDERAL ELECTION
COMMISSION

RE: Federal Elections Commission MUR #: 6844

Dear Ms. Hampton:

I represent Kaiser Foundation Hospitals, Kaiser Foundation Health Plan, Inc. and The Permanente Medical Group, Inc. (collectively, "Kaiser") in regard to the above referenced MUR. As demonstrated below, the Enforcement Division of the Office of the General Counsel should not take action against Kaiser because the Complaint set forth by the Office and Professional Employees International Union, Local 29, AFL-CIO, CLC ("OPEIU 29") does not set forth a violation of the Federal Election Campaign Act of 1971 (the "Act"). Furthermore, although not required to under the Act, Kaiser has been and continues to work as expeditiously as possible to provide OPEIU 29 with the requested voluntary payroll deductions, and will provide a system for deductions as soon as its current payroll system technology allows.

Kaiser is under no obligation to provide OPEIU 29 with a system for voluntary payroll deductions under the Act. Any obligation that Kaiser has to do so arises from OPEIU's agreements with Kaiser where Kaiser agreed to provide a voluntary payroll deduction system to OPEIU 29 members. Any relief that OPEIU 29 seeks with regard to its agreements with Kaiser must come from arbitration in accordance with those agreements. The Commission does not have jurisdiction to award relief for OPEIU 29's contract based claims.

OPEIU alleges, without explaining, that Kaiser is out of compliance with Chapter 1, Part 114 Corporate and Labor Organization Activity, Section 114.5, (Separate segregated funds). Section 114.5(k) states, in relevant part:

Availability of methods. Any corporation . . . that uses a method of soliciting voluntary contributions or facilitating the making of voluntary contributions from its stockholders or executive or administrative personnel and their families, shall make that

method available to a labor organization representing any members working for the corporation . . . for soliciting voluntary contributions or facilitating the making of voluntary contributions from its members and their families. Such method shall be made available on the written request of the labor organization and at a cost sufficient only to reimburse the corporation for the expenses incurred thereby.

11 C.F.R. § 114.5(k).

Kaiser can only be in non-compliance with this section if it is using a method of soliciting voluntary contributions from "its stockholders or executive or administrative personnel and their families." *Id.* Kaiser does not use a method of soliciting contributions from any of its salaried supervisory or management personnel. It only provides these programs for its union staff who do not meet the statute's definition of stockholders, or executive or administrative personnel.

The Act defines executive and administrative personnel as individuals: (1) who are employed by a corporation; (2) who are paid on a salary, rather than hourly basis; and (3) who have policymaking, managerial, professional, or supervisory responsibilities. 11 C.F.R. 114.1(c)(2)(i). Commission regulations state that the Fair Labor Standards Act ("FLSA") and its regulations may serve as a guideline to determine whether an individual possesses policymaking, managerial, professional, or supervisory responsibilities. 11 C.F.R. 114.1(c)(4).

Regulations under FLSA provide, in part, that an "employee employed in a bona fide professional capacity" includes any individual: (1) who is "[c]ompensated on a salary basis at a rate of not less than \$ 455 per week"; (2) whose primary duty is "management of the enterprise in which the employee is employed"; (3) who "customarily and regularly directs the work of two or more other employees"; and (4) who "has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight." 29 CFR 541.100.

Regulations under FLSA provide, in part, that an "employee employed in a bona fide administrative capacity" includes any individual: (1) "Compensated on a salary or fee basis at a rate of not less than \$ 455 per week"; (2) whose primary duty is the "performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers"; and (3) whose primary duty includes "the exercise of discretion and independent judgment with respect to matters of significance." 29 CFR 541.200.

Put simply, the hallmarks of executive or administrative personnel are salaried compensation and management or supervisory responsibilities.

Kaiser does not provide a voluntary payroll deduction system for any of its stockholders, or for any employees who meet the Act's definition of administrative or executive personnel.

Even if Kaiser offers the system to other unions, that does not create a requirement for Kaiser to offer the system to OPEIU 29 under the Act. Union employees are typically not the type who are salaried and have managerial or supervisory responsibility. By way of example, OPEIU 29's agreement with Kaiser specifically excludes "supervisory employees" from the definition of "employee." See Exhibit A, OPEIU 29 Agreement. Further, professionals who are represented by a labor organization are explicitly excluded from the Act's definition of administrative or executive personnel. 11 CFR 114.1(c)(2).

Even though it is not required under the Act, Kaiser does intend and has always intended to honor OPEIU 29's request for voluntary payroll deductions. Unfortunately, Kaiser is constrained by the technological limits of its payroll system. It is working as fast as it is reasonably able to provide OPEIU 29 with a payroll deduction option. The Commission should dismiss the matter based on this fact alone. See Recommendation to Dismiss ADR 098/MUR. 5290 (recommending that the Commission take no further action because "the issue that gave rise to the complaint has been addressed" and there is "no value in pursuing the matter").

Please do not hesitate to contact me should you wish to discuss this matter further.

Sincerely,


David A. Vicinanza

DAV